

STATE OF MICHIGAN
COURT OF APPEALS

JERI KAUPP,

Plaintiff-Appellant,

v

MOURER-FOSTER, INC.,

Defendant-Appellee.

UNPUBLISHED

July 14, 2009

No. 281578

Ingham Circuit Court

LC No. 05-001441-NZ

Before: Bandstra, P.J., and Whitbeck and Shapiro, JJ.

BANDSTRA, J. (*dissenting*).

I respectfully dissent from the majority's conclusion that we should reverse the trial court's determination that summary disposition was warranted against plaintiff in this case.

As the parties agree, there is no question here that plaintiff engaged in a protected activity as defined by the Whistle Blower Protection Act and that later she was discharged. The only factual question at issue is whether her protected activity was causally connected to the discharge. Plaintiff was not entitled to rely upon the mere temporal relationship between the two events but, instead, had to respond to defendant's motion for summary disposition with facts to "show something more than merely a coincidence in time between protected activity and adverse employment action." *Garg v Macomb Co Community Mental Health Services*, 472 Mich 263, 286; 696 NW2d 646 (2005).

A close review of plaintiff's response to the motion for summary disposition below, as well as her brief filed on appeal, shows that she came forward with no other facts. That is especially telling because defendant's briefs and oral argument on the motion below clearly highlighted that the lack of this evidence was the reason that summary disposition was warranted. Similarly, the trial judge's questions to plaintiff's counsel reiterated that this was the issue upon which the decision would rest. Because plaintiff nonetheless failed to "set forth specific facts showing that there [was] a genuine issue for trial" on the causation element of her claim, summary disposition was properly granted. MCR 2.116(G)(4). Accordingly, we should affirm.

The majority opinion goes to great lengths in culling through the record to come up with facts by which it reasons that a genuine issue was created as to the causal connection. However, that approach is inappropriate on appellate review. *Derderian v Genesys Healthcare Systems*, 263 Mich App 364, 388; 689 NW2d 145 (2004) (This Court "will not search the record for

factual support for [a party's] claims.") The trial court properly determined the matter below on the basis of the facts presented, and we should not retrospectively reverse that decision on the basis of an inappropriate review of a record that was not before the trial court.

/s/ Richard A. Bandstra